No. 78-1619

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19__

DOLORES A. MOSHER,
Petitioner

v.

H. C. SAALFELD and
WESLEY J. ROBINSON

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Ninth Circuit

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IN PROPRIA PERSONA

April 26, 1979

INDEX

CASE CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, DOLORES A. MOSHER, in Propria Persona , respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceedings on January 26, 1979.

OPINIONS BELOW

Ninth Circuit. The opinion of the court below in

this case (Appendix A, infra, pp. 22-28) has not yet been reported.

The opinion of the court below denying petitioners' petition for rehearing (Appendix B, infra, pp. 29) was not reported.

District Court. There was no formal opinion of the district court, The opinions...two transcripts in that court, including the Judge's statements on granting the summary judgment, are reprinted in the Appendix hereto. The opinions of the district court in this case are unreported.

The first opinion of the district court is set forth in Appendix C, infra, pp. 30-35;

The oral opinion of the district court denying petitioners' response to defendants motion for summary judgment is set forth in Appendix D, infra, pp. 36-38 ;

The opinion of the district court denying the petitioners' response to defendants motion is set forth in Appendix E, infra, pp. 39-41;

The oral opinion of the district court denying petitioners' motion for relief from order of summary judgment is set forth in Appendix F, infra, pp. 42-43 ;

The opinion of the district court denying petitioners' motion for relief from order of summary judgment is set forth in Appendix G, infra, pp.44 -45 .

JURISDICTION

The judgment of the court below (Appendix A, infra, p. 22) was entered on December 13, 1978. A timely petition for rehearing was denied on January 26, 1979 (Appendix B, infra, p. 29). This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the action of the Court of Appeals for the Ninth Circuit (a) in affirming the judgment entered by the federal district court have established a direct conflict with the decision of the Supreme Court in Lynch v. Household Finance Corp. 405 U.S. 538 (1972) thereby has made an unconstitutional (under the Due Process Clause) or an unlawful or an otherwise improper denial of justice or descrimination against petitioner -- particularly when the issues presented by petitioner's appeal are issues of a type which would be reviewed and determined by the court of appeals on the merits in a comparable case.

(b) whether the Court of Appeals for the Ninth Circuit can issue a judgment in conflict with other Ninth Circuit decisions -- particularly in the light of the standards set forth in Hansen v. May, 502 F.2d 728 (9th Cir. 1974) without showing on improper denial of justice or descrimination against petitioner.

2. Whether the precedental effect set by the afore mentioned cases appearing in Question 1 (a) and (b) would be changed to the effect that property rights -- that are basic civil rights to all U.S. citizens -- are no longer protectable under 42 U.S.C. 1983 and the Fifth and Fourteenth Amendments to the Constitution.

3. Whether, under the provisions of "Right to Jury Trial"... as set forth in F.R.C.P. Rule 38, the Seventh Amendment to the Constitution and F.R.C.P. Rule 56 on Summary Judgment and pursuant to due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution in that the Court of Appeals in

affirming the judgment of the district court has, under the circumstances set forth below, deprived petitioner of procedureal due process protected rights.

(a) by issuing an order of judgment based upon invalid procedure and practice with reguard to summary judgment by disreguarding petitioner's Response, Evidence and Objections to Summary Judgment.

(b) by issuing an order of judgment by ruling upon "issues of fact" that the procedures of Federal Courts clearly set forth as issues for JURY decision.

(c) by depriving the petitioner of the right of jury trial which was timely requested and case was docketed as a jury action and for which at NO TIME HAS PETITIONER EVER WAIVED THAT RIGHT.

(d) in denying and discrimination of petitioner by depriving petitioner of the equal protection of the laws and of procedureal due process in the U.S. District Court for the District of Oregon.

4. Whether the Court of Appeals' refusal to allow petitioner TRIAL, by Jury, of disputed "fact issues" constitutes an unconstitutional (under due process clause) or an unlawful or an otherwise improper denial of justice or discrimination against petitioner.

5. Whether the erroneousness of the decision below where summary judgment was given on an insufficent affidavit and complete lack of any relevant evidence as to a crucial element of the alleged offense to support defense and was rebutted and contradicted by affidavit and evidence from the petitioner, but said evidence was disreguarded by the court constitutes a real question on conflict in interpretation and application of principle or

language of Legislative and Supreme Court decision with reguard to summary judgment and thereby the Supreme Court's power of supervision should be excerised because of the lower courts departure from the accepted and usual course of judicial proceedings to uphold and protect future litigants from such a misuse of summary judgment principle.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provided in pertinent part as follows:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ... "

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> " ... nor shall any state deprive any person of life, liberty, or property without due process of law ... "

Title 42 U.S.C.A. 1983, provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The "federal question" section of the Judicial

Code, 28 U.S.C. 1331, provides as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, ..."

The "civil rights" section of the Judicial Code, 28 U.S.C. 1343, provides as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

The statute describing the power of conservator over property of protected person in which the Conservator may act, O.R.S. 126.293, reads as follows:

"Power of conservator over property of protected person. A conservator shall take possession of all the property of substantial value of the protected person, and of rents, income, issues and profits therefrom whether accuring before or after the appointment of the conservator, and of the proceeds from the sale, mortgage, lease or other disposition thereof. However, the conservator may permit the protected person to have possession and control of property and funds for living requirements as appropirate to the needs and capacities of the protected person. The title to all property of the protected person is in the protected

person and not in the conservator."

The statute describing the powers of conservator in general in which the Conservator may act, O.R.S. 126.313 (1), reads in pertinent part as follows:

"Powers of Conservator. A Conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation, to:

(1) Collect, hold and retain assest of the estate including land wherever situated, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested." (Emphasis added)

The statute describing Oregon property law right of entry, O.R.S. 105.105, reads as follows:

"Entry to be lawful and peaceable only. No person shall enter upon any land, tenement or other real property unless the right of entry is given by law. When the right of entry is given by law the entry shall be made in a peaceable manner and without force." (Emphasis added)

Rule 38 (a) (d) of the Federal Rules of Civil Procedure, dealing with jury trial of right, provides as follows:

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(d) Waiver. ... A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." (Emphasis added)

Rule 56 (c) of the Federal Rules of Civil Procedure, dealing with summary judgment, provides as follows:

> "(c) ... that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ..."

STATEMENT OF THE CASE

This case originated upon the filing of a complaint (R. 1-12) by petitioner Dolores A. Mosher seeking to recover damages for the alleged denial of petitioners Civil Rights. With the filing of originial Complaint the case proceeded through discovery with defendants filing Motions to Dismiss, all of which were handled as Motions for Summary Judgment and were denied. Petitioner was then ordered to file an AMENDED COMPLAINT (R. 423-426) this was preceeded by the first opinion of the court (App.C,infra,pp. 30-35) and followed by defendants' Answer thus bringing the case to agreement between the parties as being ready for trial on the issues so at the September Call day this case was set for an October Pretrial hearing. On October 4, 1976 Petitioner's Proposed Pretrial Order was served on defendants. On October 6, 1976 the Clerk's Office sent out a notice setting the Pretrial Conference with Judge Juba for October 27, 1976 and resetting Pretrial for November 15, 1976. (Conference Proceedings to be found in Court of Appeals Record) THEREAFTER numerous actions by the defendants followed which resulted in the withholding of evidence from the court, the delaying and halting of trial proceedings and the denying of petitioner from performing court approved discovery required as a result of Pretrial Conference held October 27, 1976, until on February 17, 1977 defendants again moved the Court for Summary Judgment.

(R. 527-542) Petitioner filed a Response to defendants motion for summary judgment (R. 543-596), wrote a letter to Judge Juba (R. 608), and filed a Motion for Relief from order of summary judgment (R. 612-698). All of these filings were disreguarded by Judges Juba and Belloni and it was Ordered by the district court that the defendants' Motion for Summary Judgment be granted and the action dismissed, Judgment was filed on May 26, 1977. Petitioner immediately followed with the filing of the Notice of Appeal and Appeal was taken to the U.S. Appeals Court, Ninth Circuit within the time allowed.

Petitioner alleged that Defendants and/or their accomplice(s) unlawfully broke into and entered her residence on May 9, 1974, NO Warrants or Notice issued. Petitioner further alleged that Defendants and/or their accomplice(s) unlawfully took personal property belonging to petitioner, changed the lock on the door and posted No Trespassing signs (agreed fact in pretrial order) on all entrances preventing petitioner from entering her own (home) property, thereby locking petitioner from her home and home operated business. Petitioner further alleged that Defendants and/or their accomplice(s) conspired to deprive her of real and personal property without due process of law.

The Defendants in their Motion for Summary Judgment clearly state conferring with the State of Oregon Attorney Generals Office in relation to their contrived plan of action (admitted conspiracy) and that receiving from the Attorney General or members of his staff "advice", "legal approval", "permission" to break into and enter petitioner's residence inspite of both the Attorney Generals Office and the Department of Veterans' Affairs, H.C. SAALFELD, Director and Court appointed Conservator of the Estate of James L. Bury and

WESLEY J. ROBINSON, Trust Officer acting on said fore mentioned Estate were clearly in possession of the knowledge pertaining to the proper disposition of this property real or personal, furthermore, Mr. Bury had "no personal property" in the residence on May 9, 1974.

Defendants contend they acted pursuant to ORS 126.293 and ORS 126.313 (1). The Estate Inventory claim (R. 674-676) clearly identify Mr. Bury's real and personal property claim on May 9, 1974, filed on April 23, 1974 is an accounting of Mr. Bury's assets and makes NO CLAIM to the real or personal property in question. A second Estate Inventory claim filed on May 15, 1974 after the Defendants took possession of the residence and locked petitioner from her home and business and removed personal property belonging to petitioner in an effort to cover up their recent action cleary identifies Mr. Bury having only a 50 percent interest in the property located a 36 N. Baxter Street, Coquille, Oregon and continues to make NO CLAIM to the personal property , even though by then Mr. Bury had been given possession of the unlawfully secured items (R. 677-679).

Petitioner agreed that the afore stated Statutes grants the authority to "safeguard"(term used by the defendants) the property of a protected person -but- said authority did not extend to taking possession of jointly held property between husband and wife prior to entry of a court Decree making equitable division of property under the divorce laws of the State of Oregon and locking her out of her home before the Divorce Court could even hear the case. Further said acts were committed in contempt of a Lane County Circuit Court Judge's instructions and Order issued by the court determing that this property was not Estate owned and that the Probate Court had NO

NO JURISDICTION (R. 162-165)(i.e. Conservator).

The Oregon State Governor confirmed that Petitioner was unlawfully locked out of her residence "without due process" and that they (defendants and/or thier accomplice(s) had unlawfully taken possession of Petitioners property both real and personal, extending so far as to possessing Petitioners clothing and all personal effects. May, 1974-Ted Winters, Ombudsman,(witness for petitioner) states "After consultation with the Attorney General's office, VA decided she had authority to be in the house until property settlement was made in a divorce proceeding..." (R. 577). One year later, April 1975, Mr. Bury was awarded all real and personal property in a dissolution proceeding that possesses more error even than this case in order to cover up the action of May 9, 1974. Also for the courts convience Mr. Bury was not an incompetent on May 9, 1974. The Lane County Circuit Court on February 11, 1974 determined Mr. Bury to be no longer an incompetent and relieved him from this status at the time of dismissing Petitioner as Guardian and the Conservator was appointed for certain financial purposes only.

There are a number of "basic" disputed facts in this case but for purposes of keeping this statement "concise" will dispense with them.

The Defendants contend "that he (Mr. Robinson) acted in goodfaith, in his official capacity, relying upon legal advice and believing in the reasonableness of his actions". For Defendant Saalfeld there has been nothing but admitted participation, no defense and no affidavit received in this case. The Defendants as executive officers claim qualified immunity and absoulte judicial immunity from their actions of May 9, 1974.

Petitioner disputed the afore claims of Defen-

dant Robinson's Affidavit by Affidavit and Evidence and further stated that the determination as to whether or not Defendant Robinson acted in "good faith", "according to official capacity", and "in a reasonable manner" is an issue of fact for JURY decision after all disputed facts have been entered through trial procedures and that after all facts and evidence have been brought before the court and jury any question of immunity would be decided in view of the state of mind and under what capacity or authority Defendant performed the acts. (R. 544-552)

Defendant Robinson contends he committed said acts pursuant to "legal permission" from the State Attorney General's Office and further said he acted [alone].

Petitioner disputed these claims in Defendant Robinson's Affidavit in that the Attorney General's Office, including his office staff, does not provide the right to grant a State Agency (Dept. of Veterans' Affairs) the right to VIOLATE Oregon State Laws; the Laws of the United States or the Constitution of the United States. Mr. Robinson, further states he acted [alone] but Petitioner submitted evidence to show that two persons entered the residence and committed the said acts on May 9, 1974.

Petitioner has since received from the Defendants a "true admission" concerning the Defendants' accomplice, finally received as the result of a second court order made on July 18,1977 after the Summary Judgment Order had been issued. This was brought to the attention of the Court of Appeals but the district court and the Court of Appeals both have chosen to "turn their eyes" and not "see" the real issues present in this case and give total consideration and support to the issues presented by the Defendants, even though they be

in error and totally void of evidence and ignore any Responses, Affidavits, Evidence, Witnesses, Briefs and other filings Petitioner has submitted in this case.

The course of proceedings in this case therefore has been limited to Call day status reports and Motion hearings thereby denying Petitioner of her right to trial and presentation of ALL EVIDENCE before the Court and JURY. The Court of Appeals followed with an affirmation of that procedure and Judgment.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the prior decision of this Court in Lynch v. Household Finance Corp. 405 U.S. 538 (1972), where the Supreme Court has held property rights protectable under U.S.C. 1983.

The District Court in its first opinion herein (App. C, infra, p. 30) originially upheld this decision of the Supreme Court but later rejected to support its findings. The Court of Appeals, Ninth Circuit decision further rejects to uphold the decision of this Court.

The question here is of importance to the administration of the federal laws and justice. If the question presented by this case has not already been answered by Lynch v. Household Finance Corp., then it is a question which this Court should answer, because it is a recurring question of critical importance in the administration of federal law.

Settlement of the question by this Court is in the public interest, for Petitioners case is representative of a problem confronting many persons. Indeed the very question raised here, and on which the Ninth Circuit and District Court are divided with the

Supreme Court is essentially one of statutory interpretation and is of prime importance that the Supreme Court uphold its decision that property rights are protectable under USC 1983.

2. The decision below of the Ninth Circuit conflicts, not only with the decision of the Supreme Court affirming Lynch v. Household Finance Corp. (supra) but also, with applicable decisions of its own Ninth Circuit in Hansen v. May, 502 F.2d 728 (9th Cir. 1974),

Where it first upheld that personal property taken by State Officials was protectable under USC 1983. The Ninth Circuit decision in this case now rejects that earlier decision.

Again, the question here is of importance to the administration of the federal laws and settlement of the question by this Court is in the public interest, since NO Person by virture of his being a State Official or Employee should be allowed to break and enter into another's residence and remove personal property without due process of law.

3. The decision below conflicts with decision of this Court securing the Seventh Amendment right of trial by jury.

It is plain on the face of the record that Petitioner was denied trial (by jury) because this case could well be called a "prima facie" case where all evidence has been found to be against the accused and the accused has not contradicted or overcome that evidence by any other evidence. The lower courts have, therefore, feared to allow the evidence to be tried before a "JURY" knowing the verdict very well may be brought against the defendants. Thus, showing discrimination and depriv-

ing petitioner of the equal protection of the laws and of procedureal due process in the Courts.

The lower court (federal district) first set a date for hearing of defendants' Motion for Summary Judgment allowing oral argument but after petitioner filed her rsponse to that Motion the court changed that date to an earlier one denying petitioner oral argument. Petitioner for the Courts convience has included as an opinion of the court Appendix D (infra, p.36) which is the transcript of that hearing held on the defendants Motion for Summary Judgment. Petitioner made an attempt to speak oral argument even though it was denied by the court and her attempts were constantly "cut off" by Judge Juba who allowed the granting of Summary Judgment and decided it upon the Affidavit of one defendant, Mr. Robinson, even though it was strongly rebutted and contradicted both in the Response filed and orally in open court by Petitioner. The findings and recommendations (App. E, infra p. 39) which recommended granting defentants Motion contains many unture statements and refuses to give consideration to Petitioners Response to defendants Motion determining Petitioners Affidavit, Evidence, Witnesses Affidavits to be null and void and without merit thereby giving them no respect in the issue at hand.

Petitioner followed this recommendation by filing a Motion for Relief from order of Summary Judgment. Judge Belloni treated this Motion as proper objections to Judge Juba's findings and recommendations, and heard oral argument "per say" on Petitioner's objections on May 2, 1977.(App. F, infra p. 42) At this time Petitioner clearly stated that Judge Juba was ruling in his findings and recommendation on "good faith" and "immunity" for the Defendants, when in truth these are "issues of fact" along with a number of additional facts or controversies to be determined by a JURY and are not points of law to be

ruled on by a Judge, furthermore a plea of "immunity" had been disallowed by Judge Juba prior to the time of filing the Amended Complaint. This action has been designated a JURY TRIAL from the first filing of the Complaint and bears eight (8) "issues of fact" for a Jury decision. Petitioner was allowed no further oral argument on the disputed facts of case. There is NO Oregon law that allows a State Agency or its employees to break into private property and under the Oregon Tort Act Immunity Not Applicable to State Agency.

The district court filed an Order (App. G, infra, p. 44) granting Defendants Summary Judgment and that the action is dismissed.

The Court and the Defendants' obviously have had a difficult time in following and understanding the Rules of Federal Procedure. U.S. Magistrate Judge Juba has failed to recognize that this action has been designated a Jury Trial action and it is a mistake to deny the presentation of evidence, and further that the cause of action here is brought as a "due process violation" of the U.S. Constitution and USCA 1983. It has been quite evident to the "simplest of interpretation" that the Defendants have at NO TIME conducted themselves in a proper and orderly manner and cannot be construed to be anything other than actions of "bad faith". First, Unlawfully breaking into and entering a residence and taking of personal property belonging to someone else is to be accepted as "reasonable and appropriate and normal acts in the course of official conduct" by our government officers, i.e. Defendants. Secondly, Defendants have failed to follow the Federal Rules of Civil Proceedure; have further failed to follow Orders and Instructions issued by the Courts; fraud, misrepresentation and other misconduct has been the norm throughout every transaction in

this case submitted by the defendants until misrepresentation of the "issues of fact" extending to a second request for Summary Judgment after the Court had already denied original request in August, 1976 ruling at that time that there are issues in this case and further submitting an invalid Affidavit as evidence and deliberately withholding other evidence from the Court.

The Court of Appeals have entered judgment affirming all the preceding procedure and judgment of the District Court.

In view of the following provisions of Right to Jury Trial, Petitioner would have received more "justice" from a Kangaroo Court.

The Seventh Amendment to the U.S. Constitution guarantees the right to a jury trial in the federal courts in certain civil actions. It provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, ...".

The Rules Enabling Act (28 USC 2072), under which the Federal Rules were promulgated, mandates that the right of trial by Jury must be preserved. According, Rule 38 (a) provides that the right "as declared by the Seventh Amendment ... shall be preserved to the parties inviolate." And, Rule 38 (d) further provides that "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

In jury trials, the jury sits as "trier of fact". It is up to the jury to arrive at a verdict based on <u>factual</u> determinations, rather than resolving legal issues. The jury determines <u>both</u> "basic" and "ultimate" facts. By "basic" facts is meant those facts which are merely evidentary, "ultimate" facts are the conclusions arrived at by evaluating the "basic" facts. The important point is that, as

trier of fact, the jury determines both kinds of facts.

Petitioner presents the following example of "basic" facts, but not limited to, found in this case that have been denied proper treatment: (1) Defendant Robinson testifies in his Affidavit he entered the residence through a broken basement window, Petitioner has submitted evidence that they forced entry through the front door; (2)Defendants testify by Affidavit only one person, Mr. Robinson, entered the residence and committed said acts, Petitioner has submitted evidence that two persons entered the residence of May 9, 1974; (3) Defendants testify by Affidavit they acted pursuant to "good faith", official duty", with reasonableness" and "legal permission", Petitioner controverted this testimony on numerous occasions by Affidavit, Witnesses and Evidence. The lower courts have repeatedly chosen to ignore Petitioner's evidence in support of disputed fact issues thereby denying Petitioner from the right of Jury Trial to decide important facts.

The Defendants have depended largely on "State Law" throughout the procedings of this case instead of following Federal Practice procedures, but, if state law denies jury trial where federal courts customarily permit such trial, through not requested to do so by the Seventh Amendment, the federal policy favoring jury decisions of disputed fact question will prevail over the contrary state rule. In Byrd v. Blue Ridge Electric Cooperative, 356 U.S. 525 (1958), where the court stated:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence--if not the command--of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

This question is important to the administration of the federal law and to the preservation of the United States Citizens Constitutional Rights.

Settlement of this question by this Court is in the interest of the public, because if the preceeding procedure on Summary Judgment is allowed to stand it destroys for future litigants Seventh Amendment protection of trial by jury.

> 4. Under Rule 56(c) the basic thrust of a motion for summary judgment is that the other side's case has no merit ... that "there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law."

The Defendants, as written in the preceeding pages, prepared a Motion for Summary Judgment misrepresenting the "issues of fact" to the court, thereby, contending that there are NO disputed facts and even though Petitioner filed a Response seting forth the real issues and disputed facts as clear as possible in the case the preceding proceedure continued (afore written material).

Petitioner repeatedly controverted the Credibility of Defendant Robinson's Affidavit in addition to other disputed facts and to controvert the Credibility of an Affidavit is in itself a question of fact. This Affidavit is the [only] statement or evidence submitted by the Defendants and Robinson contends to be the sole witness to the actions of May 9, 1974 although Petitioner has submitted much evidence controverting Robinson's contention and credibility.

The Court may excerise its discretion to deny sum-

mary judgment in order to preserve the opposing parties (petitioner's) right to cross-examine this witness at trial.

The Court also has discretion , however, to deny summary judgment where it is shown that the opposing party was unable to controvert (completely) some material fact because the moving party (defendants) had effective control over the evidence as to said fact (Defendants have refused to allow Department Records to be submitted to the Court and further denied Petitioner Court approved discovery relating to a portion of these Records).

In such cases, summary judgment is denied in order to preserve the opposing parties right to cross-examine the affiant, and to enable the trier of fact to determine (jury) the affiant's sincerity on the witness stand (170 F.2d 660; Calif. CCP437c)

Examples: (a) where moving party's affidavit is by a person who was the sole witness to the facts at issue. [Robinson contends to be a sole witness but Petitioner submitted evidence to controvert]

(b) where the case turns of the affiant's intentions or state of mind. Matters of intention or motivation are so personal that there is rarely any way in which a counter-affidavit can be made; hence summary judgment will not be granted thereon.

Whether or not Defendant Robinson acted in "good faith", official capacity, with reasonableness and with "legal permission" from the State Attorney General, are questions of -- state of mind, credibility and intention -- and therefore is material issue of fact that the district court and the Court of Appeals refused to "see" and unlawfully granted Summary Judgment to the Defendants and denied Petitioner her "right to" and "trial by jury".

The question here is of prime importance to be settled by this Court, therefore, the Supreme Court's power of supervision should be excerised because of the lower courts departure from the accepted and usual course of judicial proceedings to uphold and protect future litigants from such a misuse of summary judgment principle.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.

Respectfully submitted,

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IN PROPRIA PERSONA

April 26, 1979

APPENDIX A

The OPINION of the court below: CA 77-2641

Appeal from the United States
District Court for the District
of Oregon

Before: GOODWIN and ANDERSON, Circuit Judges, and
JAMESON,* District Judge.

PER CURIAM:

Delores A. Mosher, appearing pro se, has appealed from a summary judgment dismissing her civil rights action against H.C. Saalfeld, the Director of the Oregon Department of Veterans' Affairs, and Wesley J. Robinson, a trust officer employed by the Department.[1]

In her amended complaint appellant sought actual and punitive damages from appellees, pursuant to 42 U.S.C. 1983, alleging that they conspired to and did deprive her of property without due process of law by forcibly entering her house while she was at

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

1. In her initial complaint, appellant named 24 individuals, one state agency, and two "Jane Does" as defendants in her civil rights action pursuant to 42 U.S.C. 1983 and 1985(2) and (3). After the court granted numerous motions to dismiss appellant filed an amended complaint, limiting her claim for relief to charges under 42 U.S.C. 1983 against Saalfeld and Robinson.

work, removing personal property, locking her out of the house by changing the locks, and posting the house with "No Trespass" signs. The case was referred to a United States Magistrate for trial. After extensive discovery, appellees moved for summary judgment. The magistrate recommended that the motion be granted. Following objections by appellant, the district judge made a de novo review of the portions of the proposed findings and recommendations to which objection had been made. Summary judgment was then entered dismissing the action. We affirm.

Factual background

On June 23, 1969, the Veterans Administration found James L. Bury, a veteran, "incompetent to properly handle funds" and "in need of a guardian". In state court proceedings his mother was appointed his guardian on May 1, 1970. On September 30, 1971 Bury married appellant, and on July 10, 1972 the court substituted appellant as Bury's guardian. The facts leading to this action were well summarized by the magistrate as follows:

> The Burys purchased a house in Coquille, Oregon, financed through the Department of Veteran Affairs. Mr. Bury moved out of the house on December 8, 1973, and filed dissolution proceedings against the plaintiff. He also petitioned to have plaintiff removed as his guardian. Subsequently, in 1974, the Lane County Circuit Court dismissed plaintiff as guardian and placed Mr. Bury under a conservatorship with the Department of Veteran Affairs. Defendant Robinson was appointed trust officer and was charged with safeguarding Mr. Bury's property and estate. In May of 1974, Mr. Bury contacted defendant Robinson and asked that Robinson obtain an oak

table and color television set from the house in Coquille, where plaintiff continued to reside. Robinson, concerned about the fact that the dissolution proceedings were not yet finalized, consulted the State Attorney General and was advised that he could legally obtain the articles that Mr. Bury requested.

On May 9, 1974, Robinson went to the Coquille house. He had previously been informed that the home was unoccupied and that the phone had been disconnected. He found the mail box full of letters and a broken basement window, which further confirmed his belief that the house was unoccupied. He entered the home through the broken basement window, removed the two items requested by Mr. Bury, changed the locks, posted the property with Department of Veteran's Affairs signs, and notified the local County Service Officer as well as the Coquille Police Department.

Subsequently, plaintiff informed the Department of Veteran's Affairs that she had not abandoned the house. Arrangements were made for plaintiff to reoccupy the house, which she did.

In April 1975, the marriage between plaintiff and Mr. Bury was dissolved. The color television and oak table were awarded to Mr. Bury.

Liability of Saalfeld

In her deposition appellant stated that she named Saalfeld as a defendant because he was the Director in charge of the Department of Veterans Affairs. There is no evidence that saalfeld played any personal role in the alleged deprivation of property. This court has held that in a 1983 action vicarious liability may not be imposed on a state or municipal officer for the acts of lower officials in the absence of a state law imposing such liability. Boe-

ttger v. Moore, 483 F.2d 86, 87 (9th Cir. 1973); Hesselgesser v. Reilly, 440 F.2d 901, 903 (9th Cir. 1971). Appellant has cited no Oregon law which would impose vicarious liability on Saalfeld.

Appellant argues that she does not rely upon the doctrine of respondeat superior, but rather upon her allegation that Saalfeld conspired with Robinson to deprive her of her property. While it is true that conspiracy claims may be brought under 1983 (Mizell v. North Broward Hospital District, 427 F.2d 468, 473 (5th Cir. 1970), more than vague conclusory allegations are required to state a claim. See Hickey v. New Castle County, 428 F. Supp. 606, 611 (D. Del. 1977). In her deposition appellant relies upon alledge conversations between Saalfeld, the Governor of Oregon and others, but she did not set forth the substance of the conversations. In any event, these conversations occurred after appellant had been locked out of her house. The facts upon which appellant relies are insufficient to show that Saalfeld conspired with anyone to deprive appellant of her property or to violate her constitutional rights.

Liability of Robinson

Robinson relies upon the defenses of qualified exceutive immunity and absolute judicial immunity. Under the qualified executive immunity doctrine (see Scheuer v. Rhodes 416 U.S. 232, 247-48 (1974)), this court has held that a government officer performing acts in the course of official conduct is insulated from damage suits "if (1) at the time and in light of all the circumstances there existed reasonable grounds for the belief that the action was appropriate and (2) the officer acted in good faith". Mark v. Groff, 521 F.2d 1376, 1379-80 (9 Cir. 1975).

Robinson has met these conditions. As conservator

of Bury's estate, it was Robinson's duty to protect Bury's property. See Or. Rev. Stat. 126.293 and 126.313(1). The reasonableness of Robinson's actions must be determined from what he knew at the time. Robinson was informed that the house was unoccupied and that the telephone had been disconnected. Bury requested him to retrieve certain items from the house. Robinson found the mailbox full of letters, confirming in his own mind that no one had been at the house for a substantial period of time. Robinson stated he entered the house through a broken basement window.[2] Because Bury was still married to appellant, Robinson checked with the State Attorney General's office and was told he could remove the color television and oak table. Afterward he changed the locks on the house, posted the property with Department of Veterans' Affairs signs, and notified the local VA office and the police in an effort to safeguard Bury's property.

Appellant submitted various affidavits in an effort to dispute Robinson's good faith. While the affidavits contradicted some minor factual matters,[3]

2. Appellant contests the fact that Robinson entered her house through a broken basement window. She has introduced affidavits of persons who claim they did not know of any broken windows in the house. Regardless of how Robinson entered the house, he did so with the express authorization of Mr. Bury, as co-owner of the house.

3. As noted by the magistrate, appellant submitted affidavits from persons who saw two men at the house; an affidavit from a police officer that there was evidence the front door was forced; and another affidavit that appellant's mother picked up the mail every day.

we agree with the magistrate that, "Whatever factual issues may be raised by plaintiff's affidavits do not reach the issue of the defendant's good faith or his reasonable belief that the action was appropriate." Robinson was insulated from suit under the doctrine of qualified executive imminity.

In the alternative Robinson claims immunity under the doctrine of absolute judicial immunity. The case of Pierson v. Ray, 386 U.S. 547 (1967), established that the common law rule of judicial immunity was an absolute bar to liability of judges in civil rights action pursuant to 1983. This absolute immunity has been extended to other officials of the judiciary: clerks of court, referees and trustees in bankruptcy, prosecuting attorneys, and receivers. See Smallwood v. United States, 358 F.Supp. 398, 402-06 (E.D. Mo. 1973), and cases cited therein.[4] In Holmes v. Silver Cross Hospital, 340 F.Supp. 125, 130-31 (N.D. Ill. 1972), absolute judicial immunity was extended to a conservator appointed by the court for the purpose of authorizing a blood transfusion for an incompetent. The rational of other judicial immunity cases is applicable here. Robinson, through the Department of Veterans' Affairs, was appointed by the court as conservator by Bury's estate. He was acting pursuant to his court appointed authority in the performance of his statutory duties. He was acting in a quasi-judicial capacity and was immune from suit.

Summary Judgment

Summary judgment is appropriate where no material issues of fact exist and where a party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.Pro. It is not intended to cut off a party's right to a jury trial where there are genuine issues to try, 6 Moore's Federal Practice, Para. 56.06[2] (2d. Ed. 1976), but is intended to eliminate the waste of the time and the re-

sources of litigants and the courts where it is shown there are no material issues of fact. Zweig v. Hearst Corp., 521 F.2d 1129, 1135-36 (9 Cir.), cert. denied, 423 U.S. 1025 (1975). When a motion for summary judgment is made and supported by affidavits or other material, the adverse party may not rest upon the allegations of his pleadings. He must respond by affidavits or otherwise and set forth "specific facts showing that there is a genuine issue for trial". Rule 56(e), Fed.R.Civ. Pro. Although both the magistrate and disrtict judge carefully explained this requirement to appellant, she did not come forth with material facts which controvert the defendants' defenses. While appellant attempted to "articulate disputed factual issues", the district court found "none that are material". We agree. Summary judgment was proper.[5]

AFFIRMED.

4. See also Sykes v. State of California (Dept. of Motor Vehicles), 497 F.2d 197,201 (9 Cir. 1974).

5. See Midwest Growers Co-op v. Kirkemo, 533 F.2d 455, 463-64 (9 Cir. 1976).

APPENDIX B

The ORDER of the court below denying petitioner's petition for rehearing.

Before: GOODWIN and ANDERSON, Circuit Judges, and JAMESON,* District Judge.

ORDER:

The panel as constituted in the above case has voted to deny the petition for rehearing and informal conference.

The petition for rehearing and informal conference is denied.

* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX C

The first OPINION of the district court.

RECOMMENDATION
AND ORDER:

Plaintiff, Dolores Mosher, sues some twenty-six persons and one state agency for violation of her civil rights. 42 U.S.C. 1983, 1985(2),(3), 1986. She bases jurisdiction on 28 U.S.C. 1331, 1343.

The twenty-six defendants comprise two "Jane Does," state and federal employees (including attorneys), state judges, state court personnel, private attorneys and one private individual. Thirteen of the defendants, being the state judges and the court personnel, have already been dismissed. See Order entered May 28, 1976. The remaining defendants, grounding their motions on different bases, all move to dismiss. Fed. R. Civ. P. 12(b) (6). Since a virtual deluge of supporting and opposing material accompanies the many motions, I will treat them as motions for summary judgment. See Fed. R. Civ. P. 12(b) (last sentence); 56.

Ms. Mosher is the former Mrs. James L. Bury. James L. Bury was rated incompetent by the United States Veterans Administration in December 1968. On May 15, 1969 Grace Rollofson, mother of James L. Bury (and also a defendant in this action), signed a petition for the appointment of the State of Oregon Department of Veterans Affairs (State VA) as guardian of her son's estate. This was ordered on June 27, 1969.

On March 27, 1970, Grace Rollofson filed a petition to have the Director of Veterans Affairs removed and herself appointed as guardian. This was ordered.

Subsequently, on June 5, 1972, Rollofson filed a petition to resign as guardian and have the Department of Veterans Affairs again appointed as her successor. At that time, Dolores Bury (now

Dolores Mosher) also filed a petition to become Rollofson's successor. The Lane County Circuit Court appointed Mrs. Bury as her husband's guardian in the summer of 1972.

Thereafter, two things happened which gave rise to the allegations of constitutional violations: (a) James Bury decided to divorce his wife and have her removed as guardian of his estate and the State Department of Veterans Affairs replaced her as guardian; and (b) Both the State VA and the United States VA objected to Mrs. Bury's October 1972 annual accounting, thus resulting in a surcharge upon plaintiff.

Plaintiff's complaint is lengthly and conclusory; it is nearly impossible to winnow the wheat from the chaff. It appears, however, from her response to the defendants' motions and from the defendants' affidavits that any valid basis for any constitutional claim is grounded on these allegations: (a) The hearings on the irregularities in the annual accounting did not comport with due process; (b) Plaintiff thereby was surcharged some $1,454.05; (c) At a time subsequent to the first hearing on the objections to plaintiff's account, State VA officials forcibly entered the Burys' Coquille, Oregon, home and removed some personal property.

42 U.S.C. 1985

To recover under 42 U.S.C. 1985, a plaintiff is required to allege and prove that the defendants conspired, and

> (1) That the purpose of the conspiracy was to deprive the plaintiff of equal protection, equal privileges and immunities, or to obstruct the course of justice in the state; (2) that the defendants intended to discriminate against the plaintiff; (3) that the defendants acted under color of state law and authority; (4) that the

> acts done in furtherance of the conspiracy resulted in an injury to the plaintiff's person or property or prevented him from exercising a right or privilege of a United States citizen.

Sykes v. State of California (Dept. of Motor Vehicles), 497 F.2d 197, 200 (9th Cir. 1974).

At many places and in many fashions, plaintiff alleges that equal protection, privileges and immunities are in issue [42 U.S.C. 1985 (3)]; or that an obstruction of justice or intimidation of a party to a court proceeding (Ms. Mosher) is involved [42 U.S.C. 1985(3)]. These conclusory allegations, however, are not supported by the facts alleged in the complaint, nor are they supported by plaintiff's response to the defendants' motions. At most, a due process violation occurred by the alleged taking of plaintiff's property. Therefore, the Section 1985 claim should be dismissed in its entirety.

DEFENDANTS GOODRICH,JOHNSON,LAUE,GILLETTE,AND PESOLA

Goodrich is an attorney for the United States Veterans Administration who was involved in filing objections to plaintiff's accounting. Johnson, Laue, Gillette and Pesola are the Attorney General for the State of Oregon and three Deputy Attorney Generals who represented the State VA through the state court proceedings.

All of these public attorney defendants are immune from suit under either Section 1983 of Section 1985. In this Circuit at least, the doctrine of prosecutorial immunity announced by the Supreme Court in Imbler v. Pachtman, 44 U.S.L.W. 4250 (U.S. Mar. 2, 1976), applies with equal force where the underlying action is civil:

> Nor do we see any significant reason to

> distinguish actions involving civil claims from those involving underlying criminal prosecution. The reasons supporting the doctrine of absolute immunity, Imbler,...apply with equal force regardless of the nature of the underlying action.
>
> We conclude, therefore, that the doctrine of absolute immunity protects the defendant [government] attorneys in this case if their allegedly imporper conduct was "intimately associated with the judicial phases" [of civil litigation involving the plaintiff].

Flood v. Harrington, No. 73-3547, Slip Opinion at 5 (9th Cir.,Mar. 19, 1976) (emphasis added).

These defendants' alleged conduct, as amply demonstrated by their affidavits, was most clearly "intimately associated with the judicial phases" of litigation involing the plaintiff. Accordingly, Goodrich, Johnson, Laue, Gillette and Pesola should be dismissed.

DEFENDANTS WHITTY,KELSAY,SIMONS,THOMSEN AND ROLLOFSON

Defendants Whitty, Kelsay, Simons and Thomsen are private attorneys who represented either the estate, Mr. Bury, Mr. Bury's mother or the plaintiff in the state court proceedings involving the divorce and the guardianship. As such, no action under color of state law is alleged or can be proved as to them. See Haldan v. Chagnon, 345 F.2d 601 (9th Cir. 1965). With no valid claim under Section 1985 remaining, no conspiracy with state officials is involved. These defendants also should be dismissed.

Grace Rollofson (as stated above, James L. Bury's mother) is nothing more than a private person who petitioned the court reguarding her son's guardianship. She apparently testified also. No state action

is involved with reguard to Mrs. Rollofson for the same reasons as stated above. Grace Rollofson, therefore, should also be dismissed.

DEFENDANT THE STATE OF OREGON DEPARTMENT OF VETERANS' AFFAIRS, ROBINSON, AND SAALFELD

The State of Oregon Department of Veterans' Affairs is not a "person" within the meaning of either Section 1983 or 1985. See City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973); Vanderzanden v. Lowell School District No. 71, 369 F. Supp. 67 (D. Or. 1973). No claim is stated against this defendant under either of these civil rights statutes.

Plaintiff, however, may be able to state a claim against the State VA, based upon the Constitution alone,[1] and against defendants Saalfeld and Robinson (these are State VA officials) under Section 1983.

The Supreme Court has held that property rights are cognizable and protectible under 42 U.S.C. 1983. Lynch v. Household Finance Corp., 405 U.S. 538 (1972). This extends to the taking of personal property by state officials. Hansen v. May, 502 F.2d 728 (9th Cir. 1974).

1. No jurisdiction exists over the Department of Veterans' Affairs under 28 U.S.C. 1343 because that is to be read in conjunction with the "person" requirements of 42 U.S.C. 1983, 1985. Jurisdiction, however, is properly involked over this defendant in that plaintiff has alleged a claim under the Constitution, bases jurisdiction on 28 U.S.C. 1331, and alleges that in excess of $10,000.00 is in controversy. Gray v. Union County Intermediate Education District, 520 F.2d 803, 805 (9th Cir. 1975).

Plaintiff alleges that property belonging to her was taken by State VA without due process of law. The complaint, however, is too conclusory in nature. Because pleadings drafted by laymen, proceeding in propria persona, are to be interpreted by the application of less rigid standards than those applied to formal documents prepared by lawyers, Haines v. Kerner, 404 U.S. 519 (1972), plaintiff should be given an opportunity to amend her complaint so as to allege a short, clear and concise statement of the facts upon which she relies against these three remaining defendants.

Dated this 9 day of August, 1976.

/s/ George E. Juba
United States Magistrate

After review of the file and record in this case, I approve the foregoing recommendation.

IT IS ORDERED:

1. Plaintiff's claim under 42 U.S.C. 1985 is dismissed without leave to amend.

2. The action as to defendants Goodrich, Johnson, Laue, Gillette, Pesola, Whitty, Kelsay, Simons, Thomsen and Rollofson is dismissed.

3. The complaint as to defendants The State of Oregon Department of Veterans' Affairs, Robinson and Saalfeld is diamissed. Plaintiff shall have ten (10) days to file an amended complaint against these three defendants only.

Dated this 11 day of August, 1976

/s/ Robert Belloni
United States District Judge

APPENDIX D

The ORAL OPINION (TRANSCRIPT OF PROCEEDINGS) held before George E. Juba, U.S. Magistrate, denying Petitioners' response to defendants motion for summary judgment and denying oral argument.

TRANSCRIPT OF PROCEEDINGS
MARCH 7, 1977

CLERK: Dolores Mosher v. H.C. Saalfeld, Civil No. 76-410.

THE COURT: Mrs. Mosher, you have problems.

MRS. MOSHER: Problems?

THE COURT: I've read the material, and your only allegation reguarding Saalfeld is that he's the director of the organization.

MRS. MOSHER: (Inaudible)

THE COURT: All you're doing is alleging that he is liable because he is the director.

MRS. MOSHER: Mr. Robinson, the trust officer, doesn't have authority to do what he did without --

THE COURT: I'm talking about your allegations, your testimony. You said the reason you're suing him is because he's the director.

MRS MOSHER: That questioning is also very incomplete, and it is in reguard to the, before the amended complaint, of course. John never really --

THE COURT: You just can't sue a person like that under 1983 because he's got to be personally involved in order to be liable. Now, as --

MRS. MOSHER: -- personally involved.

THE COURT: Pardon?

MRS. MOSHER: I feel he's personally involved.

THE COURT: I know what you feel; that's what you keep saying, that you feel that he's involved because he's the director, but we're dealing with the --

MRS. MOSHER: He's the conservator (Inaudiable), the appointed conservator by and through Mr. Saalfeld.

THE COURT: Now, as to the defendant Robinson, his

affidavits support everything, all he says, that he's immune under these circumstances.

MRS. MOSHER: He's not immune.

THE COURT: I find that on the record that he is.

MRS. MOSHER: A man that can lie as much as he did on his affidavit.

THE COURT: Pardon?

MRS: MOSHER: -- is certainly. I said that a man that can lie as much as he did in his affidavit --

THE COURT: Well, I have nothing to refute anything he said.

MRS. MOSHER: There is lots to dispute if I can take this case to trial.

THE COURT: We're at the summary stage. Mrs. Mosher.

MRS. MOSHER: What?

THE COURT: We're at the summary stage. Judgment --

MRS. MOSHER: Summary judgment has already been denied on this case one other time.

THE COURT: This one is going to be allowed.

MRS. MOSHER: They applied for it months ago and it was denied because there are issues in this case.

THE COURT: It'll be allowed.

MR. HART: Yes, your honor, I'll prepare an order.

THE COURT: I'll prepare the order.

CERTIFICATE

We, the undersigned, Kristi McCauley and Lila Jean Allen, Deputy Clerks of the United States District Court for the District of Oregon, hereby certify that on the 7th day of March, 1977, at Portland, Oregon, the entitety of the proceedings appearing in the transcript appended hereto was re-

corded on electronic recording equipment; that the foregoing 3 typewritten pages of said transcript, numbered 1 to 3 inclusive, constitute a full, correct and accurate record of the aforementioned proceedings.

Dated at Portland, Oregon, this 20th day of July, 1977.

/s/
Kristi McCauley

/s/
Lila Jean Allen

APPENDIX E

The OPINION of the district court denying Petitioners' response to defendants motion for summary judgment.

FINDINGS AND
RECOMMENDATION

Plaintiff, pro se, brings this action pursuant to 42 U.S.C. 1983 against defendant Saalfeld, Director of the Department of Veterans' Affairs of Oregon, and defendant Robinson, a trust officer in that department.

James Bury was adjudged incompetent in December 1968. Plaintiff married Mr. Bury on September 30, 1971, and was appointed her husband's guardian in the summer of 1972.

The Burys purchased a house in Coquille, Oregon financed through the Department of Veteran Affairs. Mr. Bury moved out of the house on December 8, 1973, and filed dissolution proceedings against the plaintiff. He also petitioned to have plaintiff removed as his guardian.

Subsequently, in 1974, the Lane County Circuit Court dismissed plaintiff as guardian and placed Mr. Bury under a conservatorship with the Department of Veteran Affairs. Defendant Robinson was appointed trust officer and was charged with safeguarding Mr. Bury's property and estate.

In May of 1974, Mr. Bury contacted defendant Robinson and asked that Robinson obtain an oak table and color television set from the house in Coquille, where plaintiff continued to reside. Robinson, concerned about the fact that the dissolution proceedings were not yet finalized, consulted the State Attorney General and was advised that he could legally obtain the articles that Mr. Bury requested.

On May 9, 1974, Robinson went to the Coquille

house. He had previously been informed that the home was unoccupied and that the phone had been disconnected. He found the mail box full of letters and a broken basement window, which further confirmed his belief that the house was unoccupied. He entered the home through the broken basement window, removed the two items requested by Mr. Bury, changed the locks, posted the property with Department of Veterans' Affairs signs, and notified the local County Service Officer as well as the Coquille Police Department.

Subsequently, plaintiff informed the Department of Veteran's Affairs that she had not abandoned the house. Arrangements were made for plaintiff to reocupy the house, which she did.

In April 1975, the marriage between plaintiff and Mr. Bury was dissolved. The color television and oak table were awarded to Mr. Bury.

Plaintiff alleges that defendants violated her civil rights by depriving her of her rights to real and personal property. The defendants have moved for summary judgment. For the following reasons, the motion should be granted.

Plaintiff admits in her deposition that defendant Saalfeld's only connection with this case is that he was "in charge" of the office. The doctrine of respondeat superior has no place under the civil rights statutes. Sanberg v. Daley, 306 F. Supp. 277, 278 (D.Ill. 1966). Personal involvement is contemplated. Salazar v. Dowd, 256 F. Supp. 220, 223 (D. Colo. 1966). See also Bennett v. Gravelle, 323 F. Supp. 203, 214 (D. Md. 1971), cert dismissed, 407 U.S. 917 (1972). Accordingly, summary judgment should be granted as to defendant Saalfeld.

Defendant Robinson admittedly entered the home and removed the items. His motion for summary judgment is based on his qualified immunity

as a government officer performing acts in the course of official conduct. In this reguard, Robinson has submitted affidavits that swear to the facts as set out above. In addition, the affidavits attest to defendant's good faith and the reasonable belief in the appropriateness of his actions.

Plaintiff has submitted a flood of opposing affidavits in an attempt to raise an issue of material fact. For example, plaintiff submits affidavits from "witnesses" who saw two men at the house. An affidavit from the Coquille police states that there is evidence that the front door was forced. Another affidavit states that plaintiff's mother picks up the mail every day. Whatever factual issues may be raised by plaintiff's affidavits, however, the opposing affidavits do not reach the issue of the defendant's good faith or his reasonable belief that the action was appropriate. And that is the only material issue for purposes of this motion. Accordingly, summary judgment should be granted as to defendant Robinson. See Midwest Growers Co-op Corp. v. Kirkemo, 533 F.2d 455, 463-64 (9th Cir. 1976); Burgwin v. Mattson, 522 F.2d 1213, 1214 (9th Cir. 1975).

Dated this 21 day of March, 1977.

/s/ George E. Juba
United States Magistrate

APPENDIX F

The ORAL OPINION (TRANSCRIPT OF PROCEEDINGS) held before Robert C. Belloni, U.S. District Court Judge, denying Petitioners' motion for relief from order of summary judgment.

TRANSCRIPT OF PROCEEDINGS
MAY 2, 1977

(Monday, May 2, 1977, the following proceedings took place:)

THE CLERK: The next case is 76-410, Delores A. Mosher vs. H.C. Saafield.

THE COURT: Good morning.

MRS. MOSHER: I'm Delores Mosher. Judge Juba has ruled in his findings and recommendation that good faith and immunity for the Defendant, when in truth these are issues of fact along with a number of additional facts or controversies to be determined by a jury and are not points of law to be ruled on by a Judge.

This action has been designated a jury action from the first filing of the Complaint and bears eight issues of fact for a jury decision.

THE COURT: All right. Counsel?

MR. MacMILLAN: Your Honor, a motion for summary judgment was granted in this case before Judge Juba. We will simply stand on our memorandum and affidavits in that original motion. This is a motion to reconsider that original order.

THE COURT: All right. I'll give the matter further study and make a prompt decision.

MRS. MOSHER: Thank you.

MR. MacMILLAN: Thank you.

I, the undersigned, Joseph F. McCloskey,III,

an Official Court Reporter of the United States District Court for the District of Oregon, do hereby certify that I reported in Stenotype, the proceedings occurring in the transcript appended hereto; that I thereafter caused my stenotype notes, so taken, to be reduced to typewriting under my direction; and that the foregoing and hereto attached pages of typewritten matter, numbered one and two, constitutes a ful, true and accurate record of said proceedings so reported by me in Stenotype, to the best of my skill and ability, as aforesaid.

Dated at Portland, Oregon, on this the 18th day of July, 1977.

/s/
JOSEPH F. McCLOSKEY, III,
Official Court Reporter

APPENDIX G

The OPINION of the district court denying Petitioners' motion for relief from order of summary judgment.

ORDER AND JUDGMENT

On March 22, 1977, Judge Juba filed findings and recommendation which recommend granting defendants Saalfeld's and Robinson's motions for summary judgment. Although he signed an amended version of this findings and recommendantion[1] on March 21, 1977, the amended findings and recommendation was not filed until May 5, 1977.

On March 30, plaintiff filed a motion for relief from order of summary judgment. I have treated this motion as being proper objections to Judge Juba's findings and recommendations, and heard oral argument on plaintiff's "objections" on May 2, 1977.

Pursuant to 28 U.S.C. 636(b)(1), I have made a de novo review of those portions of the proposed findings and recommendation to which objection has been made. I fully agree with Judge Juba's recommended disposition.

Although plaintiff again attempts to articulate disputed factual issues, I find none that are material. Summary judgment is proper.

IT IS ORDERED that defendants' motion for summary judgment is granted, and the action is dismissed.

Dated this 24 day of May, 1977.

/s/ Robert C. Belloni
United States Disrtict Judge

1. The amended findings and recommendation merely inserts two additional citations, a Ninth Circuit case and a Second Circuit case. These citations support the rule that the doctrine of respondeat superior is not applicable in a civil rights action.

JUDGMENT

Based on the record,

IT IS ORDERED AND ADJUDGED that the action is dismissed.

Dated: May 25 , 1977.

ROBERT M. CHRIST, Clerk

/s/ Donald M. Cinnamond
by Donald M. Cinnamond
Chief Deputy Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 19___

No. _____

DOLORES A. MOSHER,
Petitioner.

v.

H.C. SAALFELD and
WESLEY J. ROBINSON

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of April, 1979, three copies of the Petition for Writ of Certiorari were personally served on Souther, Spaulding, Kinsey, Williamson and Schwabe, Counsel for the Respondents, at 1200 Standard Plaza Building, 1100 S.W. 6th Ave., Portland, Oregon 97204. I further certify that all parties required to be served have been served and that an Acknowledgment of Service is forthcoming by United States Mail with postage thereon prepaid.

Dolores A. Mosher in pro. per.
780 N. 28th Street
Springfield, Oregon 97477
Tele: (503) 726-9374

Cm 78-1619

78-1619

IN THE SUPREME COURT OF THE UNITED STATES

No. [redacted]

OCTOBER TERM 1978

DELORES A. MOSHER,

Petitioner,

vs.

H. C. SAALFELD and
WESLEY J. ROBINSON,

Respondents.

BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM 1978

DELORES A. MOSHER,

Petitioner,

vs.

H. C. SAALFELD and
WESLEY J. ROBINSON,

Respondents.

BRIEF IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

(A) Does the doctrine of respondeat superior impose vicarious liability upon state officials in civil rights actions under 42 U.S.C. § 1983 where state law does not specifically provide for such liability?

(B) Are state officials entitled to a summary judgment in civil rights actions where they demonstrate by affidavit that they acted within the scope of their official duty, in good faith, and with reasonableness, and where the plaintiff does not challenge these elements?

(C) Are state officials acting in a fiduciary capacity as conservator of an incompetent or protected person pursuant to court order entitled to a summary judgment under the doctrine of absolute judicial immunity?

STATEMENT OF THE CASE

1. Nature of the Case, Course of Prior Proceedings, and Disposition in the Court Below.

Plaintiff-Appellant Delores A. Mosher (hereinafter referred to as "plaintiff" or "Mrs. Mosher") filed her original complaint naming twenty-four individuals, one state agency, and two "Jane Does" as defendants in a "civil rights" action pursuant to 42 U.S.C. §§ 1983, 1985(2) and (3), and 1986, seeking $1,248,000.00 "actual" damages and $1,000,000.00 punitive damages (R. pp. 1-12). She included in her litany of defendants five state of Oregon and federal attorneys, four state of Oregon Circuit Court Judges, three state of Oregon Court of Appeals Judges, two Deputy Circuit Court Clerks, one Probate Auditor for Lane

County, Oregon, one Court Reporter, three private attorneys and a host of her other real or imagined malefactors (R. pp. 1-12).

After court action upon numerous motions to dismiss, plaintiff filed her amended complaint, restricting her claim for relief to charges pursuant to 42 U.S.C. § 1983 against defendant-appellee, H. C. Saalfeld, Director of the Department of Veterans Affairs, State of Oregon (sometimes hereinafter referred to as "Mr. Saalfeld") and Wesley J. Robinson, Trust Officer employed by the State of Oregon Department of Veterans Affairs (sometimes hereinafter referred to as "Mr. Robinson"; Messrs. Saalfeld and Robinson are sometimes hereinafter referred to jointly as "defendants") (R. pp. 423-425). She charged:

> "That on May 9, 1974 the Department of Veterans' Affairs by and through its Director and/or Agents deprived plaintiff of her

> rights to real and personal property by forcibly breaking into and entering plaintiffs [sic] home while she was at work and removed personal property and locked plaintiff out of her home by changing door locks without lawful with NO TRESPASSING signs." (R. p. 424, emphasis in original.)

Defendants denied plaintiff's allegations (R. p. 427). They pleaded that the Lane County (Oregon) Circuit Court dismissed plaintiff as guardian of the estate of Mr. James L. Bury, plaintiff's legally incompetent husband, on February 13, 1974, and substituted the State of Oregon Department of Veterans' Affairs (hereinafter referred to as the "State VA") as conservator (R. p. 427). Oregon law charges a conservator with the general duty to safeguard the property of the protected person (R. p. 428). Mr. Bury advised State VA Trust Officer defendant Mr. Robinson that a dwelling jointly owned by plaintiff and Mr. Bury

in Coquille, Oregon, was unoccupied and requested his trust officer to secure certain personal property therein belonging to the incompetent (R. p. 428). On May 9, 1974, Mr. Robinson found the premises vacant, the telephone disconnected and the mailbox full of mail (R. p. 428). After obtaining legal approval from the Attorney General for the State of Oregon, Mr. Robinson entered the house through a broken basement window, removed Mr. Bury's personal property, and posted the real property (R. pp. 428-429). Defendants acted at all times in good faith performance of their official duties in accordance with the mandate of the law, believing in the reasonableness of their actions and pursuant to legal advice of the Attorney General (R. p. 429).

Plaintiff named Mr. Saalfeld only because he served as Director of the

State VA, not because he took any active role in these proceedings (R. pp. 537-541).

Mr. Robinson filed an affidavit which outlined in detail his connection to the transaction as related before and affirmed his good faith performance of official duty (R. pp. 592-596).

At no time did plaintiff come forward with any evidentiary challenge to Mr. Robinson's testimony of good faith performance of official duty (R. passim; R. p. 611).

Defendants moved for a summary judgment (R. p. 527) which the District Court granted (R. pp. 705-706; Pet. Cert App. B, p. 44) upon the findings and recommendations of United States Magistrate George E. Juba (R. pp. 609-611; Pet. Cert. App. E, pp. 39-41). Plaintiff wrote to Judge Juba, in part:

> ".... .
>
> "The complete illegagity [sic] and wrongfulness of a Summary Judgment ruling in reguard [sic] to this case, and being a man with your experience and reputation I find it most unbelievable that you would sacrifice your integrity and belief in justice for the above named case.
>
> "I have taken the liberty of continuing to make this letter also a [sic] integral part of the record on file.
>
> ".... ."

(R. p. 608)

Plaintiff appealed to the United States Court of Appeals for the Ninth Circuit (R. p. 708). That Court affirmed the District Court (Pet. Cert., App. A, pp. 22-28).

2. Statement of Facts.

On June 23, 1969, the Veterans Administration rated Mr. James L. Bury, a veteran, incompetent pursuant to the following statement:

> ".... . He has carried a diagnosis of schizophrenic reaction, chronic, undifferentiated type, and the history would indicate excessive use of narcotic drugs.
>
> "In view of these findings, and based upon his records, the veteran is considered incompetent to properly handle funds, and is in need of a guardian." (R. p. 261)

Because his incompetency relates to a service-connected condition, Mr. Bury receives 100% disability assistance (R. pp. 33, 158).

The Circuit Court of the State of Oregon for the County of Lane established a guardianship of the estate of Mr. Bury, with Mrs. Grace O. Rollofson, his mother, serving as guardian effective May 1, 1970 (R. pp. 33, 158, 293). Mrs. Mosher sued Mrs. Rollofson, among her many original defendants (R. pp. 1-12).

Plaintiff married Mr. Bury in Reno, Nevada, on September 30, 1971 (R. pp. 105, 230). On July 10, 1972, the Circuit Court removed Mrs. Rollofson as guardian and substituted plaintiff (R. pp. 232-233, 293). The Circuit Court found considerable fault with plaintiff's accounting and performance as guardian and initially surcharged her $4,142.67 (R. p. 169), later modified to $1,454.05 (R. p. 395), perhaps explaining one of the reasons Mrs. Mosher named the Circuit Court Judge as an original defendant in this action. During the marriage, Mr. Bury and plaintiff purchased a home, furniture and business with guardianship funds in Coquille, Oregon (R. pp. 381-382, 370, 554).

Mr. Bury moved out of the home on December 30, 1973, with the intention of dissolving his marriage to plaintiff

(R. p. 372). On or about January 18, 1974, Mr. Bury and his mother petitioned the Circuit Court to remove plaintiff as guardian and to appoint a successor conservator of his estate[1] (R. pp. 367-373). Plaintiff had refused to turn over furniture owned by Mr. Bury on request and had not properly handled the incompetent's funds (R. pp. 370, 372).

The Circuit Court removed plaintiff as guardian on February 11, 1974 (R. pp. 337, 390, 427), surcharged her (R. pp. 169, 395), and appointed the State VA as conservator (R. pp. 337, 390, 427). Mr. Robinson served as Mr. Bury's Trust Officer under the State VA conservatorship (R. pp. 592-593).

Concurrently, on January 22, 1974, Mr. Bury filed a petition in Lane

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[1]Change in Oregon law accounts for the change in nomenclature.

County Circuit Court to dissolve his marriage to plaintiff (R. p. 113). On May 12, 1975, the Circuit Court decreed dissolution of the marriage, awarding Mr. Bury the home in Coquille and the color television set (R. pp. 118-120). Plaintiff appealed, and the Oregon Court of Appeals affirmed the decree per curiam. Bury v. Bury, 24 Or. App. 775, 546 P.2d 1102 (1976), Sup. Ct. review denied (1976).

During the pendency of the dissolution proceeding, Mr. Robinson, in his official capacity, reviewed the plaintiff's Final Accounting and found discrepancies which led to the filing of objections (R. pp. 337, 593). Mr. Robinson testified at the hearing on May 6, 1974, which led to the surcharge of plaintiff (R. p. 593). Mr. Bury notified Mr. Robinson that his home at Coquille was unoccupied and that

the telephone was disconnected (R. p. 594); he requested Mr. Robinson to secure some of his personal property (an oak table and a color television set) remaining in his home (R. pp. 428, 594).

On May 9, 1974, Mr. Robinson traveled to the Coquille residence (which was later awarded by the Circuit Court to Mr. Bury, R. pp. 118-120, 547) and found it unoccupied and the mailbox stuffed full of letters (R. p. 428). He entered the premises through a broken basement window, changed the locks, posted the property with State VA signs, and notified the County Service Officer and the Coquille Police Department in an effort to safeguard Mr. Bury's real and personal property (R. p. 594). Because the Circuit Court had not resolved the dissolution proceeding, Mr. Robinson checked with the Oregon Attorney General concerning the appropriateness

of removal of the two items of personal property requested by Mr. Bury (R. pp. 594-595). Upon receiving legal advice authorizing him to do so, the trust officer removed the oak table and the color television set and turned them over to Mr. Bury (R. p. 594). (The Circuit Court awarded the oak table and color television set to Mr. Bury in the dissolution proceeding, R. p. 596.) Plaintiff complains of these acts (R. p. 424). She does not contend that Mr. Robinson forced the front door (R. p. 523) or that Mr. Robinson did not act with legal advice (R. p. 524). Shortly thereafter, plaintiff was allowed to reoccupy the property during the pendency of the dissolution proceedings (R. p. 595).

Mr. Robinson's affidavit stated that at all times he acted in good faith, in his official capacity, relying upon legal advice and believing in the reason-

ableness of his actions (R. pp. 429, 592-596). Plaintiff did not challenge these material facts (R. passim; R. p. 611). While plaintiffs who choose to appear pro se receive deference and liberal treatment, the law requires the application of common sense by the court, McKinney v. DeBord, 507 F.2d 501, 504 (9th Cir. 1974), and no rule of law demands that District Courts or adverse parties help such plaintiffs state a claim for relief.

3. Basis for Federal Jurisdiction.

Jurisdiction of the District Court rested upon 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1983, and jurisdiction of the United States Court of Appeals for the Ninth Circuit was premised upon 28 U.S.C. § 1291. Jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

Reasons for Denying Writ

SUMMARY OF ARGUMENT

The Ninth Circuit ruling, correct in law, offers no far-reaching consequences justifying consideration by this Court. The decision harmonizes with all decisions of all Federal Courts.

The doctrine of respondeat superior does not impose liability upon Mr. Saalfeld, who was named as a defendant merely because he served as Director of the State VA.

Executive officers such as Mr. Saalfeld and Mr. Robinson enjoy a qualified immunity from 42 U.S.C. § 1983 actions where they act within their official authority, in good faith, and reasonably. Such officials are entitled to summary judgment where they establish these three elements

by affidavit and plaintiff does not controvert all three, since the case therefore contains no genuine issue of material fact. In addition, such men are entitled to, and did without dispute, rely upon legal advice from the Oregon Attorney General before acting in this case.

The doctrine of absolute judicial immunity applies and protects a state official employed by a state agency acting as conservator of an incompetent. Since Mr. Robinson acted within his authority, summary judgment must be granted.

ARGUMENT

The Ninth Circuit ruling, correct in law, offers no far-reaching consequences justifying consideration by this Court. The decision accords with all known Federal Court rulings. No conflict exists.

Introduction: The Function of Summary Judgment.

Federal courts should grant summary judgments where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56(b), Fed. R. Civ. P. In Zweig v. Hearst Corporation, 521 F.2d 1129, 1135-1136 (9th Cir. 1975), cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed.2d 399 (1975), the Ninth Circuit observed:

> "Summary judgment has, as one of its most important goals, the elimination of waste of the time and resources of both litigants and the courts in cases where a trial would be a useless formality. ... ."

The present case represents an apt example of a situation requiring summary judgment. See also, Washington Post Company v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied 385 U.S. 1011, 87 S. Ct. 708, 17 L. Ed.2d 548 (1967).

A party met with a motion for summary judgment, such as plaintiff here, cannot rest upon her general pleading when confronted by specific controverting facts in affidavits or depositions; in Suckow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196, 205 (9th Cir. 1950), cert. denied, 340 U.S. 943, 71 S. Ct. 506, 95 L. Ed. 680 (1951), the court declared:

> "... . But when a general statement in a pleading is shown by specific facts stated in controverting affidavits, depositions and admissions, to be untrue, and the facts so presented are not denied and are not of such nature as to be peculiarly within the knowledge of the affiant, then no 'genuine' issue remains for the trier of the facts. ... ."

Rule 56(e), Fed. R. Civ. P. provides:

> "... . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

These two sentences were added by amendment in 1963. The Advisory Committee, 28 U.S.C. § 416, commented as follows:

> "The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are 'well-pleaded,' and not suppositious, conclusory, or ultimate. ... . [Citations omitted.]
>
> "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise

justified summary judgment, is incompatible with the basic purpose of the rule. ... . [Citations omitted.]

"It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

"The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

"Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it

shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition."

Thus, Mrs. Mosher did not present any genuine issue of material fact where she did not controvert Mr. Robinson's affidavit showing his good faith performance of official duty, pursuant to legal advice and believing in the reasonableness of his action (R. pp. 592-596). First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 289-290, 88 S. Ct. 1575, 1592-1593, 20 L. Ed.2d 569 (1968), rehearing denied, 393 U.S. 901, 89 S. Ct. 63, 21 L. Ed.2d 188 (1968); Doff v. Brunswick Corporation, 372 F.2d 801, 803-805 (9th Cir. 1967), cert. denied, 389 U.S. 820, 88 S. Ct. 39, 19 L. Ed.2d 71 (1967). As the court remarked in International Longshoremen's & Warehousemen's U. v. Kuntz, 334 F.2d 165, 169, n. 5 (9th Cir. 1964):

> "'... an opposing party who has no countervailing evidence and who cannot show that any will be available at the trial [is not] entitled to a denial of the motion for summary judgment on the basis of a hope that such evidence will develop at the trial. And, although the moving party be unaided by any presumption, when he has clearly established certain facts the particular circumstances of the case may cast a duty to go forward with controverting facts upon the opposing party, so that his failure to discharge this duty will entitle the movant to summary judgment.' 6 Moore's Federal Practice § 56.15[3] at pages 2129-2130 (1953) and cases there cited."

Moreover, affirmative defenses, such as those asserted by Mr. Robinson in this case, provide an appropriate opportunity for the use of summary judgment procedures. 6 Moore's Federal Practice § 56.08, 56-136-56-137 (2d ed. 1976).

1. The Doctrine of Respondeat Superior May Not be Utilized to Impose Vicarious Liability Upon A Public Official In Civil Rights Actions Commenced Under 42 U.S.C. § 1983.

Plaintiff named Mr. Saalfeld as a party to this action only because he acted as Director of the State VA and not because he took any active role in these proceedings (R. pp. 537-541).

The law does not impose vacarious liability upon a state official under the doctrine of respondeat superior in 42 U.S.C. § 1983 civil rights actions in absence of specific state law authorizing such liability. Boettger v. Moore, 483 F.2d 86, 87 (9th Cir. 1973); Hesselgesser v. Reilly, 440 F.2d 901, 903 (9th Cir. 1971); Williams v. Vincent, 508 F.2d 541, 546 (2nd Cir. 1974). Oregon has not enacted any rule

imposing such liability on Mr. Saalfeld. Therefore, the court correctly granted summary judgment for Mr. Saalfeld. Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976), Sup. Ct. appeal pending; Boettger v. Moore, supra; Williams v. Vincent, supra.

2. Executive officers such as Mr. Saalfeld and Mr. Robinson Enjoy a Qualified Immunity from 42 U.S.C. § 1983 actions Where they act within the scope of their official duty, in good faith and upon reasonable belief in the appropriateness of their action.

(A) The doctrine of Qualified Executive Immunity.

In 1974, in litigation arising out of the Kent State affair, this Court spoke to this important doctrinal issue and outlined

the three elements [scope of official duty, good faith, and reasonable belief] which lead to qualified immunity. In Scheuer v. Rhodes, 416 U.S. 232, 248-249, 94 S. Ct. 1683, 1692, 40 L. Ed.2d 90 (1974), the court set forth the rule:

> "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

The Ninth Circuit followed this rule in Midwest Growers Co-Op. Corp. v. Kirkemo, 533 F.2d 455, 463-464 (9th Cir. 1976):

> "... [Where] the acts of the officials named as defendants were within the scope of their authority and were performed in good faith, 'reasonably believing their actions to be legally valid and proper.' [defendants were properly granted summary judgment] ... ." See also, Mark v. Groff, 521 F.2d 1376, 1379-1380 (9th Cir. 1975).

(B) The Purpose of the Rule.

The purpose of the rule granting executive officials a qualified immunity against civil rights actions relates to the concept that public officials should not be unduly inhibited in the performance of official duties. Scheuer v. Rhodes, supra, amplified this postulate, 94 S. Ct. at 1688:

> "This official immunity apparently rested in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by the legal obligations of his position, to exercise discretion; (2) the

> danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."

The Supreme Court further remarked, 94 S. Ct. at 1689:

> "... it is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. Mr. Justice Jackson expressed this general proposition succinctly, stating 'it is not a tort for government to govern.' Dalehite v. United States, 346 U.S. 15, 57, 73 S. Ct. 956, 979, 97 L. Ed. 1427 (1953) (dissenting opinion). Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity -- absolute or qualified -- for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that

it is better to risk some error and possible injury from such error than not to decide or act at all. ... ."

Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed.2d 1434 (1959), which did not arise under the Civil Rights Act, served as a harbinger of Scheuer v. Rhodes, supra and established that the doctrine of immunity applies to lower echelon executive officers. In Barr v. Matteo, supra, 79 S. Ct. at 1339, the court said:

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties -- suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. ... ."

Again, the court commented, 79 S. Ct. at 1340:

"We do not think that the principle announced in Vilas [Spalding v. Vilas, 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780 (1896)] can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

"To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion,

> it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted -- the relation of the act complained of to 'matters committed by law to his control or supervision,' Spalding v. Vilas, supra, 161 U.S. at p. 498, 16 S. Ct. at p. 637, -- which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits."

Perhaps Judge Learned Hand's trenchant comments in Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), cert. denied, 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950), best express the underlying rationale:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints

> to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. ... .

> "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. ... ."

(C) Reliance on Qualified Legal Advice.

The courts have repeatedly held that good faith reliance upon knowledge of current law or upon a requested legal opinion satisfies the requirements for a qualified immunity in 42 U.S.C. § 1983 actions. Scheuer v. Rhodes, supra, 416 U.S. at 246; Oakley v. City of Pasadena, 535 F.2d 503, 504-505

(9th Cir. 1976); Midwest Growers Co-Op. Corp. v. Kirkemo, supra, 533 F.2d at 464; Hutchison v. Lake Oswego School District No. 7, 519 F.2d 961, 968 (9th Cir. 1975), [vacated other grounds, 429 U.S. 1033, 97 S. Ct. 725, 50 L. Ed.2d 744 (1977)]; Handverger v. Harvill, 479 F.2d 513, 516, (9th Cir. 1973), cert. denied, 414 U.S. 1072, 94 S. Ct. 586, 38 L. Ed.2d 478 (1973). Mr. Robinson acted in good faith reliance upon a legal opinion issued by the Attorney General of the State of Oregon (R. pp. 429, 594-595) and plaintiff does not contend that he acted without legal advice (R. p. 524). Therefore, he deserves qualified immunity.

(D) Summary Judgment Applies.

Courts should grant a summary judgment to an executive officer in a civil rights

action where the public official raises the defense of immunity and the plaintiff fails to controvert his good faith or reasonable belief in the appropriateness of his actions (R. pp. 592-596) as plaintiff failed here. Midwest Growers Co-Op. Corp. v. Kirkemo, supra, 533 F.2d at 464; Oakley v. City of Pasadena, supra, 533 F.2d at 503; Milton v. Nelson, 527 F.2d 1158, 1160 (9th Cir. 1976); Burgwin v. Mattson, 522 F.2d 1213 (9th Cir. 1975), cert. denied, 423 U.S. 1087, 96 S. Ct. 879, 47 L. Ed.2d 98 (1976).

3. The Concept of Absolute Immunity Protects a State Officer Acting as Conservator from 42 U.S.C. § 1983 actions.

Under the concept of absolute immunity, a state official is entitled to summary judgment upon a demonstration that he acted

within his scope of authority. Plaintiff has produced no indication that Mr. Robinson did not act as a trust officer for the State VA and within the scope of his duty; in fact, her pleading implies that he so acted (R. pp. 423-424).

Ordinarily absolute immunity applies only to judicial officers, see Pierson v. Ray, 386 U.S. 547, 553-554, 87 S. Ct. 1213, 18 L. Ed.2d 288 (1967), but Holmes v. Silver Cross Hospital of Joliet, Illinois, 340 F. Supp. 125 (N.D. Ill. 1972) extended the doctrine to conservators who act in a quasi-judicial capacity. In Holmes v. Silver Cross Hospital of Joliet, Illinois, supra, the administratrix brought a 42 U.S.C. § 1983 action alleging violation of decedent's civil rights by a court appointed conservator who authorized a blood transfusion inconsistent with the decedent's religious

convictions. The court granted the conservator's motion to dismiss saying, 340 F. Supp. at 130-131:

> "The facts concerning the order appointing Baron as conservator appear from the order itself and from the complaint. The State's Attorney of Will County, Illinois, petitioned the Will County Probate Court for a conservator to be appointed for the decedent after he had lost consciousness (an incompetent is defined in Illinois, inter alia, as one incapable of managing his person because of physical incapacity...) ... . The magistrate declared the decedent an incompetent and appointed Baron as his conservator, the appointment being 'for the purpose of consenting to surgery, blood transfusions, medicine and drugs.' ... . The decedent, whether rightfully or wrongfully, legally or illegally, had been declared an incompetent, had become a ward of the court, ... and became subject to the powers of the conservator appointed by the court.
>
> "Baron was not appointed as a general conservator or as an estate conservator, but was specifically appointed for the sole purpose of consenting to surgery and blood transfusions. His order of appointment, thus, was made with specific directions as to his course of conduct as a conservator, giving him no discretion. His liability should be no greater or less than the judge who appointed him. ... ."

Based upon its analysis, the court held that both the judge and the conservator possessed immunity. By a parity of reasoning, Mr. Robinson, the trust officer of Mr. Bury's court-appointed conservator, is entitled to absolute quasi-judicial immunity since his challenged actions relate only to his acts pursuant to court-directed duties.

Sykes v. State of California (Dept. of Motor Vehicles), 497 F.2d 197 (9th Cir. 1975), supports the principle of extension of absolute judicial immunity to executive officers acting in a quasi-judicial capacity. In that case, the Ninth Circuit extended immunity to the California

Department of Motor Vehicles and one of its employees in a civil rights action brought by an individual who had lost his license to retail automobiles. In reaching this result, the court articulated the rule, 497 F.2d at 201:

> "... [The plaintiff's] claims against both Hoover and California's Department of Motor Vehicles are equally defective on the ground of immunity. In Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968), our court held that immunity extends not only to public employees engaged in quasi-judicial functions, such as district attorneys, but also to public employees acting within the scope of their discretionary duties and official functions. Bennett v. People of the State of California, et al., 406 F.2d 36, 39 (9th Cir. 1969); Hoffman v. Halden, supra at 300 [268 F.2d 980 (9th Cir. 1959)]. Since it was within Hoover's discretionary power to grant or refuse licenses to sell motor vehicles, his motives are considered immaterial for purposes of suit under the Civil Rights Statutes. Hoffman v. Halden, supra at 300; Selico v. Jackson, 201 F. Supp. 475, 478 (S.D. Cal. 1962). See O'Campo

> v. Hardisty, 262 F.2d 621 (9th Cir. 1958); Cooper v. O'Connor, 69 U.S. App. D.C. 100, 99 F.2d 135 (1938); Comment, Civil Liability of Subordinate State Officials Under The Civil Rights Acts and the Doctrine of Official Immunity, 44 Calif. L. Rev. 887 (1956); Note, The Doctrine of Official Immunity Under the Civil Rights Acts, 68 Harv. L. Rev. 1229 (1955). ... ."

Mr. Robinson's acts partake of a judicial nature. The court charged the State VA (and hence, Mr. Robinson) with the duty of protecting the assets of a protected person. Plaintiff charges a violation of her civil rights during the performance of that duty. Public policy requires application of the doctrine of absolute immunity.

Plaintiff attempts to concoct all manner of "conflicts" between the Ninth Circuit opinion and the decisions of this court and earlier cases emanating from the Court of Appeals. Her attempts fail. The grant of summary judgment deprives no one

of a right to a jury trial because the adverse party, by definition, has failed to present a genuine issue of material fact for jury resolution. Any other rule would clog the courts. This Brief in opposition demonstrates that plaintiff has lost no right and has suffered from no conspiracy. Any contrary rule would deprive state officials of the necessary breadth of action which enables them to carry out their duties. All Courts acted impartially and correctly so there exists no need to invoke the power of supervision.

In reality, plaintiff is disappointed because she lost a divorce case and because the state officials found her performance of the fiduciary duties wanting. Having exhausted the appeal procedures provided by state law Bury v. Bury, supra, 24 Or. App. 775, 546 P.2d 1102 (1976) Sup. Ct. review

denied (1976), Plaintiff persists in wasting the time of an overworked federal court system with a feigned complaint of a violation of her civil rights. There exists no reason to proceed any longer with this case.

CONCLUSION

The Ninth Circuit correctly affirmed the District Court and granted summary judgment to both defendants because, as state officials acting reasonably, in good faith, and in the scope of their authority, they are entitled to either absolute judicial immunity or, at the least, qualified executive immunity. In addition, the law does not permit Mr. Saalfeld to be held

responsible under a theory of respondeat superior. The writ should be denied.

Respectfully submitted,

SOUTHER, SPAULDING, KINSEY,
WILLIAMSON & SCHWABE
RIDGWAY K. FOLEY, JR.

By: _____
RIDGWAY K. FOLEY, JR.
of Attorneys for Respondents

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-1619

DOLORES A. MOSHER,
Petitioner,

v.

H.C. SAALFELD and
WESLEY J. ROBINSON.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Ninth Circuit

PETITIONER'S REPLY BRIEF

DOLORES A. MOSHER
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IN PROPRIA PERSONA

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SUPREME COURT OF THE UNITED STATES

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the Ninth Circuit

PETITIONER'S REPLY BRIEF

The Respondents, in its opposing brief in No. 1619, have presented no opposition to the Questions presented by the Petitioner in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, but have raised the questions that were presented in the District Court below that are issues for Jury Trial--shown in Questions "B" and "C" page 2 Respondents Brief in Opposition. Question "A", with reguard to Respondeat Superior, was determined not allowable when first

presented and because Mr. Saalfeld has admitted participation the Petitioner does not rely on this rule.

Petitioner finds it most difficult to follow the Supreme Courts requested form in replying to Respondents Brief in Opposition since Respondents have submitted material facts to State Cases not before this Court.

Petitioner restricts her REPLY to an argument submitted by the Respondents for the first time.

Respondents rely on this reasoning to request that the Petition for a Writ of Certiorari be denied.

RESPONDENTS believe that because "plaintiff is disappointed because she lost a divorce case and because the state officials found her performance of the fiduciary duties wanting...Plaintiff persists in wasting the time of an overworked federal court system with a feigned complaint of a violation of her civil rights." (Respondents Brief pages 42-43)

IT IS quite plain on the face of the record and in the following pages that Petitioner has not filed a fictitous, pretended or simulated complaint and therefore any wasting of the courts time should be duly credited the Respondents for their inability to restrict themselves to the issues of the complaint.

The U.S. District Court Judge Robert C. Belloni disallowed immunity to the Department of Veterans' Affairs Director and Conservator H.C. SAALFELD and to WESLEY J. ROBINSON, trust officer, and ORDERED plaintiff (Petitioner) to file the Amended Complaint restricting her claim for relief to charges pursuant to the U.S. Constitution and 42 USC 1983 against defendant-appellees (Respondents) H.C. SAALFELD, Conservator and WESLEY J. ROBINSON, trust officer.

Respondents in quoting the afore said Amended Complaint in the Brief in Opposition have left out a phrase at the top of page 5 by the omission of the following, "without lawful authority or notice and posted the home with".

Reguarding the facts (opposition) presented by the Respondents pertaining to the issues of State Court litigation not relevant to the case now pending before the U.S. Supreme Court. Beginning at line six (6) of page ten (10) where Respondents state that "The Circuit Court found considerable fault with plaintiff's accounting and performance as guardian and initally surcharged her $4,142.67 (R. 169) -- Petitioner wishing to clarify this issue before the court states that even though the Circuit Court did not agree it did sign the order prepared by the attorney representing the Department of Veterans' Affairs. The amount shown above constitutes the entire amount of money received by the guardian (Petitioner) during the final accounting period, thus disallowing all previous court approved and ordered disbursements and further guardian (petitioner) was not notified of the final account hearing of May 6, 1974. Guardian (petitioner) Petitioned the court to reopen the guardianship account case to allow hearing of evidence presented by guardian against the charges of May 6, 1974 -- case was reopened and heard September 30 and October 1, 1974 and resulted in the "later modified (surcharge) to $1,454.05" where guardian was surcharged for monies not even received by her personally or as guardian.

U.S. Magistrate Judge Juba reviewing the foregoing issues in the response to the original complaint states "(a) The hearings on the irregularities in the annual accounting did not comport with due process; (b) Plaintiff thereby was surcharged some $1,454.05;". (Pet 31 and R. 418-419).

The Circuit Court Judge presiding over the two (2) day hearing as a result of all the courtroom harassment [petitioner] was being subjected to became so confused and angry left the bench. Plaintiff (petitioner) turning to her attorney spoke "Without a Judge on the bench is this hearing over?" Attorney replied "I guess so".

Respondents claim beginning at line 14 that "Mr. Bury and plaintiff (petitioner) purchased a home, furniture and business with guardianship funds". To set the record straight -- Petitioner owned all furniture, including the color television, prior to the "marriage"; down payment to purchase home ($2,450.00) was made by Petitioner from Petitioner's personal funds as well as many payments thereafter; the business was begun with funds from Petitioner's employment and a personal bank loan and at all times operated with Petitioner's personal funds. (R. 398) Further, during the term of said "marriage" Petitioner remained totally self-supporting and often also maintained the total support of Mr. Bury.

Respondents further claim "Plaintiff had refused to turn over furniture owned by Mr. Bury on request and had not properly handled the incompetent's funds". Petitioner did not refuse Mr. Bury anything but on the other hand offered to give Mr. Bury additional items and did give additional items to him that belonged to her before the "marriage" and Mr. Bury refused to accept some of them. Petitioner had packed all of Mr. Bury's belongings plus additional household items he would need to have inorder to keephouse. (R. 361) As to handling Mr. Bury's funds -- ALL monies were completely and orderly accounted for and had been disbursed pursuant to an order issued by the circuit court (probate) but Petitioner was surcharged

for money that she did not even receive personally or as guardian.

Pertaining to the dissolution -- After Petitioner was served with dissolution proceedings and the matter looked into Petitioner challenged the validness of the "marriage" and entered a motion to dismiss and sought an annulment. On or about March 18, 1974 a hearing in the Circuit Court was held, for which there is no record in the courthouse and Petitioner was not notified. Mr. Bury's attorney agreed that "In the alternative if the Court should find it necessary to require the Conservator appear for petitioner [MR. BURY] the court should find the marriage void from its inception and grant an immediate annulment." But, the Conservator, Dept. of Veterans' Affairs by and through its Director MR. SAALFELD was added as a party to the dissolution (although no appearance at the dissolution hearing was made) and the procedings continued. (R. 85-134 contain Briefs of Oregon Court of Appeals, Bury v. Bury)

THEREFORE Petitioner was subjected to a fraudulent dissolution proceding. The real property and personal property in question were outstanding on both Mr. Bury's claim for property settlement and Petitioner's counter-claim in that proceeding and the Attorney General representing the Conservator (Dept. of V.A.) and Wesley J. Robinson, trust officer were well informed of the proper disposition of the property, both real and personal. BUT, on May 9, 1974 broke into and entered and took possession of the real property and personal property of Petitioner without lawful authority, warrant or notice. Therefore Petitioner was deprived of her property without "due process of law" under the Fifth and Fourteenth Amendments and the laws of the United States particulary USC 1983 and the foregoing acts were the beginnings of the conspiracy to deny Petitioner of her property.

ALTHOUGH Respondents have submitted numerous cases concerning officials acting within their official capacity, good faith, and reasonableness the Petitioner challenged these material facts and that the Respondents acting WITHOUT LAWFUL AUTHORITY, a WARRANT, or NOTICE do not have immunity or protection by the provisions afforded in the supporting cases submitted by Respondents pursuant to officials acting within their official capactiy.

CONCLUSION

For the reasons stated above, as well as those stated in the Petition for Certiorari, Petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

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IN PROPRIA PERSONA

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 1619

DOLORES A. MOSHER,
Petitioner,

v.

H.C. SAALFELD and
WESLEY J. ROBINSON.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

I hereby certify that on this 30 day of May, 1979, three copies of the Petitioner's Reply Brief were served on Souther, Spaulding, Kinsey, Williamson and Schwabe, Counsel for the Respondents addressed to Ridgway K. Foley, Jr., at 1200 Standard Plaza Building, 1100 S.W. 6th Ave., Portland, Oregon 97204, contained in a sealed envelope with postage paid thereon and deposited in the post office at Eugene, Oregon.

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